(24,949)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 666.

THE PEOPLE OF THE STATE OF NEW YORK ON THE RELATION OF WALTER S. KENNEDY, AS NEXT FRIEND OF FAYETTE KENNEDY, WARREN KENNEDY, AND WILLIS WHITE, JR., PLAINTIFFS IN ERROR,

vs.

FREDERICK W. BECKER, AS SHERIFF OF ERIE COUNTY, NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 24, 1915.

a *Return to Writ of Error.*

STATE OF NEW YORK:

Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of WALTER S. KENNEDY, Appellant,
against
FREDERICK W. BECKER, as Sheriff of Erie County, Respondent.

Papers on Appeal from Order Reversing Order Discharging Prisoners on Writ of Habeas Corpus.

Wesley C. Dudley, District Attorney, Erie County, Attorney for Sheriff of Erie County, Respondent, Buffalo.
George P. Decker, Attorney for Relator-Appellant, 721 Powers Bldg., Rochester, N. Y.

1 STATE OF NEW YORK:

Court of Appeals.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of WALTER S. KENNEDY, Appellant,
against
FREDERICK W. BECKER, as Sheriff of Erie County, Respondent.

Statement under Rule 41.

This proceeding was begun on June 1, 1914, by the issuance of writ of habeas corpus directed to Frederick W. Becker as Sheriff of Erie County.

The relief sought was the discharge from custody of Fayette Kennedy, Warren Kennedy and Willis White, Jr., Seneca Indians, arrested and detained for an alleged violation of section 176 of the Conservation Law of the State of New York, to wit, alleged spearing of fish in the creek known as Eighteen Mile Creek in the town of Evans, County of Erie, State of New York, within one mile from where the said creek empties into Lake Erie, on the 31st day of May, 1914.

2 An order sustaining the writ of habeas corpus and discharging the prisoners forthwith was made and entered by Mr. Justice Charles A. Pooley, at the Supreme Court Special Term held in Buffalo, June 2, 1914.

On July 1st, 1914, notice of appeal from said order was duly served by defendant.

The Appellate Division on January 6th, 1915, handed down its

decision reversing the order appealed from and remanding the prisoners to the custody of the defendant on which was entered the order of reversal from which the appeal to this court is taken.

There has been no change in the parties, whose names are given above and no change in attorneys, except the Attorney-General of the State of New York has been substituted for E. W. McIntyre, who acted as attorney for the Conservation Department of the State of New York in the institution of the proceedings had under and pursuant to the Conservation Law and George P. Decker has been substituted in place of Leroy Andrus, Esq.

3 *Order of Special Term.*

At a Special Term of the Supreme Court of the State of New York, Held at the City and County Hall in the City of Buffalo, in and for the County of Erie, on the Second Day of June, 1914.

Present: Hon. Charles A. Pooley, Justice Presiding.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of WALTER S. KENNEDY
against
FREDERICK W. BECKER as Sheriff of Erie County.

A writ of habeas corpus having been heretofore duly issued on the petition of Walter S. Kennedy to the above named Frederick W. Becker, as sheriff of Erie County, commanding said sheriff forthwith to produce before this court the bodies of Fayette Kennedy, Warren Kennedy and Willis White, Jr., for the purpose of inquiring into the cause of the detention of said Fayette Kennedy, Warren Kennedy and Willis White, Jr., by him, as is alleged, unlawfully imprisoned and detained and the said prisoners having been brought before this court by said sheriff who makes return that said Fayette Kennedy, Warren Kennedy and Willis White, Jr., are im-
4 prisoned and detained by him under and by virtue of the several commitments dated May 31, 1914, made and signed by Frank D. Booth, a justice of the peace of the town of Tonawanda, Erie County, New York, copies whereof are annexed to said petition and made a part thereof.

After due notice of hearing upon the return of said writ having been served upon the district attorney of Erie County, and an examination having been had and the court having heard the allegations of Herbert Lee, Esq., assistant district attorney of Erie County, and Walter S. Kennedy, as next friend of said Fayette Kennedy, Warren Kennedy and Willis White, Jr., and after hearing Leroy Andrus of counsel for said prisoners, and it having been stipulated in open court before me by and between the district attorney of Erie County representing the sheriff of Erie County, and Mr. Leroy Andrus, as attorney for the above named defendants, that as a part of the traverse of the return to the writ of habeas

corpus heretofore granted herein by me as aforesaid, the following words should be considered as a part thereof, viz: "That each of the defendants herein is a Seneca Indian, and a member of the Seneca Nation of Indians residing upon the Cattaraugus reservation of said Seneca Nation, under the charge of an Indian agent of the United States, and that the charge against the above named defendants and each of them was a violation of section 176 of the Conserva-
5 tion Law of the State of New York to wit: The alleged spearing of fish in the creek known as Eighteen Mile Creek in the town of Evans, County of Erie, and State of New York, within one mile from where the said creek empties into Lake Erie, on the 31st day of May, 1914, for use as food by said Indians and families, but not for commercial purposes and the alleged having in their possession two small mouthed black bass, two bullheads, one catfish, two carp, and nine suckers; that the place where said offense was alleged to have been committed is within, or upon certain lands and territory mentioned and described or included in certain grants or deeds made to the Crown of Great Britain, in trust for the Iroquois Indians, and in certain other treaties, grants, agreements, contracts, or deeds entered into with the Crown, the colony of New York, the State of New York and others, under the sanction of the United States of America or otherwise, and including among others a treaty with the Six Nations, entered into in 1784, between Oliver Wolcott, Richard Butler and Arthur Lee, commissioners plenipotentiary from the United States, and the Sachems and warriors of the Six Nations; the treaty with the Six Nations, ratified in 1789; the treaty with the Six Nations known as the Pickering Treaty, ratified in 1794; the agreement with the Senecas in September, 1797, between the Senecas and Robert Morris; the treaty of 1802 whereby the Seneca Nation of Indians sold a certain portion of their reservation consisting of a strip of land one mile wide, along Lake Erie
6 from Eighteen Mile Creek to Cattaraugus Creek (including the place where said Indians were spearing fish, upon the 31st day of May, 1913,) to Wilhelm Willink, and others; the treaty under date of January 15, 1838, whereby the New York Indians sold all of their property in the State of New York to Thomas Ludlow Ogden and Joseph Fellows; the treaty of January 15, 1838, ratified August 26, 1842; the treaty with the Seneca Indians, Tonawanda Band, in 1857, whereby the Seneca Indians bought back the land known as the Tonawanda Reservation; the agreement with the Indians of Indian Territory, entered into with the United States in 1865, and others, and that in said treaty or treaties, contracts, deeds or agreements as above set forth, the right was reserved to the said Indians therein mentioned to fish in the waters on and in said lands mentioned in said grants, treaties, contracts, deeds or agreements, including the place wherein the offense charged against the above named defendants herein was alleged to have been committed."

And it having been made further to appear to the court that said Seneca Nation of Indians and its members have from time immemorial claimed to reserve, and to have exercised and claimed the

right to exercise the reservation privilege and right of free, common and unrestricted fishing within said lands and territory.

And it having been duly made to appear to the court that
7 each of said persons above named imprisoned and detained under and by virtue of such commitments, is a Seneca Indian, and a member of the Seneca Nation of Indians, residing upon the Cattaraugus reservation of said Seneca Nation under the charge of an Indian agent of the United States, being the same Seneca Nation which was one of the Five Nations of Iroquois Indians, and entitled to all the rights, benefits, privileges and reservations set forth and contained in said above mentioned grants, treaties, agreements, deeds and contracts.

It is therefore ordered, that said Fayette Kennedy, Warren Kennedy and Willis White, Jr., be and each of them is forthwith discharged from the custody of the said sheriff and from further imprisonment under said commitments, on the ground that the ancient grants, submissions, agreements, deeds and the treaties above mentioned, and particularly the treaty made between the Seneca Nation of Indians and Ogden Land Company, composed of Robert Morris and other persons, under date of the year 1797, permitting these said persons who are Indians to hunt and fish in the waters of this State, included within said treaties, particularly Eighteen Mile Creek, New York, at will, and at all seasons of the year, regardless of the provisions of the game laws of the State of New York.

Dated, Buffalo, N. Y., June 2, 1914.

CHAS. A. POOLEY, *J. S. C.*

Granted June 2, 1914.
JOHN P. ABBOTT,
Sp. Dep. Clerk.

8 *Notice of Appeal to Appellate Division.*

Supreme Court, Erie County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of WALTER S. KENNEDY
against
FREDERICK BECKER, as Sheriff of Erie County.

To Simon A. Nash, Clerk of the County of Erie, and Leroy Andrus, Attorney for Walter S. Kennedy.

SIRS: Please take notice that the defendant herein appeals to the Appellate Division of the Supreme Court in and for the Fourth Department from an order entered herein by the Hon. Charles A. Pooley, filed on the second day of June, 1914.

Dated this 1st day of July, 1914.

WESLEY C. DUDLEY,
Dist. Attorney, Erie County.

Office and P. O. Address, 17 City and County Hall, Buffalo, N. Y.

9 *Petition for Writ of Habeas Corpus.*

To the Supreme Court:

The petition of Walter S. Kennedy herein respectfully shows: That Fayette Kennedy, Warren Kennedy and Willis White, Jr., the persons in whose behalf the writ is applied for, are now imprisoned and restrained in their liberty; that said prisoners are now confined in the jail of Erie County, at Buffalo, in the County of Erie, New York, and the officer or person by whom they are so imprisoned and restrained is as follows: The sheriff of Erie County. That they have not been committed, and are not detained by virtue of any judgment, decree, final order, process or mandate issued by a court or a judge of the United States, in a case where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court; or by virtue of the final judgment or decree of a competent tribunal of civil or criminal jurisdiction; or the final order of such a tribunal, made in a special proceeding, instituted for any cause, except to punish him for a contempt; or by virtue of an execution or other process, issued upon such a judgment, decree or final order.

That the cause or pretence of such imprisonment and restraint, according to the best knowledge and belief of your petitioner, is an alleged violation of the Conservation Law of the State.

10 That annexed hereto is a copy of the mandate by virtue of which each of said prisoners is pretended to be imprisoned and restrained, and each thereof marked respectively A, B, and C.

That your petitioner alleges that such imprisonment and restraint is illegal in this, to wit: that there is no valid commitment or authority for such imprisonment.

Wherefore, your petitioner prays that a writ — habeas corpus issue, directed to Frederick W. Becker, sheriff of the County of Erie, commanding him that he have the body of said three defendants by him imprisoned and detained, together with the cause of such imprisonment and detention, before this court at Special Term at the City of Buffalo, New York, forthwith, on the 1st day of June, 1914, pursuant to the provisions of the Code of Civil Procedure.

Dated at the City of Buffalo, N. Y., this 1st day of June, 1914.

WALTER S. KENNEDY,
Petitioner.

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

11 Walter S. Kennedy, being duly sworn, says that he has heard read the foregoing petition, and knows the contents thereof, and that he believes it to be true.

WALTER S. KENNEDY,
Petitioner.

Sworn to before me, this 1st day of June, 1914.

CORA McGREED,
Comm. of Deeds in and for the City of Buffalo, N. Y.

Filed: Erie Co. Clerk's office, June 1, 1914.

Writ of Habeas Corpus.

The People of the State of New York to Frederick W. Becker, Sheriff of Erie County:

We command you, That you have the body of Warren Kennedy, Fayette Kennedy and Willis White, Jr., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Warren Kennedy, Fayette Kennedy and Willis White, Jr., is called or charged, before the Supreme Court at Special Term at the City and County Hall, Buffalo, N. Y., forthwith on the 1st day of June, 1914, at — o'clock in the — noon of that day to do and receive what shall then and there be considered concerning the said Fayette Kennedy, Warren Kennedy or Willis White, Jr., and have you then and there this writ.

12 Witness, Hon. Charles A. Pooley, one of the justices of the Supreme Court of —, the 1st day of June, one thousand nine hundred and fourteen.

[SEAL.] C. W. CHAPIN,
Deputy Clerk.

LEROY ANDREWS,
Petitioner's Attorney,
709 *Mutual Life Building, Buffalo, N. Y.*

I allow the within writ, 1st day of June, 1914.

CHAS. A. POOLEY,
Justice Supreme Court.

Filed: Erie Co. Clerk's office, June 1, 1914.

Return to Writ of Habeas Corpus.

Supreme Court, Erie County.

THE PEOPLE OF THE STATE OF NEW YORK
against
FAYETTE KENNEDY, WARREN KENNEDY, and WILLIS WHITE, JR.

To the Supreme Court:

The return of Frederick W. Becker, sheriff of Erie County, to the writ of habeas corpus, heretofore granted in the above
13 entitled action by Hon, Charles A. Pooley, one of the Justices of the Supreme Court on the 1st day of June, 1914, respectfully shows:

1. That at the time when said writ was served and upon the 1st day of June, 1914, said Frederick W. Becker, as sheriff of the County of Erie, had in his custody and under his power and restraint, the said Fayette Kennedy, Warren Kennedy and Willis White, Jr., the persons for whose relief said writ was issued.

2. That the authority and true cause of the imprisonment or restraint of said Fayette Kennedy, Warren Kennedy, and Willis White, Jr., by said Frederick W. Becker, as sheriff of Erie County, is as follows:

That heretofore and on or about the 31st day of May, 1914, Fayette Kennedy, Warren Kennedy, and Willis White, Jr., were arrested in the act of the commissions of a crime, viz: Violating Section 176 of the Conservation Law of the State of New York in that they were spearing fish in the creek known as Eighteen Mile Creek in the town of Evans, and in the County of Erie, State of New York, within one mile from where said creek empties in Lake Erie, and for having in their possession two small-mouthed black bass, two bullheads, one catfish, two carp, and nine suckers and mullet, all in violation of said Section 176 of the Conservation Law.

14 That forthwith after the arrest of the above named three defendants they were taken before Frank D. Booth, a justice of the peace of Erie County, in and for the Town of Tonawanda, New York, at the Village of Kenmore in said town and county, and that each of them were then and there charged jointly and severally with a violation of Sec. 176 of the Conservation Law of the State of New York, in that, on the 31st day of May, 1914, they took fish by means of a spear in a creek known as the Eighteen Mile Creek in the Town of Evans, in the County of Erie and State of New York, within one mile from where said creek empties into Lake Erie, and then and there having in their possession two small-mouthed black bass, two bullheads, one catfish, two carp and nine suckers and mullet, in violation of Section 176 of the Conservation Law.

That said defendants and each of them were on said 31st day of May, 1914, duly arraigned before said Justice of the Peace, Frank D. Booth, at Kenmore in the Town of Tonawanda, New York, and in answer to the said charge above set forth which was read to them by said justice of the peace, they and each of them did on said date plead "Not Guilty" of said charge and requested an adjournment in order to secure an attorney or to obtain bail. That an adjournment was granted to them and in default of bail said defendants above named, and each of them were, on the said 31st day of May, 1914, duly committed to the custody of Frederick W. Becker,

15 Sheriff of Erie County, New York, pending the hearing of said charge made against them.

That a copy of the proceedings had before said justice of the peace and a copy of the commitment of said three defendants above named, are hereto attached and made a part of this return.

That said defendants are detained by said Frederick W. Becker, as sheriff of the County of Erie, by virtue of said commitments.

That said writ is returned herewith and that said defendants are produced before the court pursuant thereto.

Dated, June 1, 1914.

(Signed) FREDERICK BECKER,
Sheriff,

By JOHN J. PRICE,
Under Sheriff of Erie County.

On this 31st day of May, 1914, Fayette Kennedy, Warren Kennedy and Willis White, Jr., were arraigned before me charged by Special Game Protector Robert Suor, with violating section 176 of the Conservation Laws of the State of New York, in that they were spearing fish in the creek known as Eighteen Mile Creek in the town of Evans, State of New York, within one mile from where said creek empties into Lake Erie, and for having in their
16 possession two small-mouthed black bass, two bullheads, one catfish, two carp and nine suckers and mullet.

That in answer to said charge the defendants, and each of them pleaded "Not Guilty" and asked for an adjournment in order to obtain counsel and bail, and said adjournment was granted and in default of bail, I committed them and each of them to the Erie County jail pending a hearing.

(Signed) FRANK BOOTH,
Justice of the Peace for the Town of Tonawanda, N. Y.

STATE OF NEW YORK,
County of Erie, City of Buffalo, ss:

John J. Price, being duly sworn deposes and says, that he is the under sheriff of Erie County, mentioned in this action, that he has read the foregoing return and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOHN J. PRICE.

Sworn to *and* before me this 1st day of June, 1914.

CHARLES H. CUTTING,
Notary Public in and for Erie County, Commissioner of Deeds in and for the City of Buffalo, N. Y.

17 STATE OF NEW YORK:

Court of Special Sessions, County of Erie.

THE PEOPLE OF THE STATE OF NEW YORK
against
FAYETTE KENNEDY.

The sheriff of the County of Erie, N. Y., is requested to receive and detain Fayette Kennedy, who stands charged before me for violation of section 176 of the Conservation Laws to answer the charge before a Court of Special Sessions in the Town of Tonawanda in said county.

Dated at the Town of Tonawanda, N. Y., the 31st day of May, 1914.

FRANK D. BOOTH,
Justice of the Peace of the Town of Tonawanda.

Affidavit of No Opinion of Special Term.

STATE OF NEW YORK,
County of Albany, ss:

Benjamin McClung, being duly sworn, says that he is
18 Assistant Deputy Attorney-General of the State of New York and that no opinion in writing was given by Hon. Charles A. Pooley, Justice, before whom this proceeding was heard, as deponent is informed and believes.

BENJ. M. McCLUNG.

Sworn to before me this 17th day of September, 1914.

LILLIAN C. CHASE,
Notary Public, Otsego County.

Certificate filed in Albany County.

19 *Order of Appellate Division.*

At a Term of the Appellate Division of the Supreme Court of the State of New York in and for the Fourth Judicial Department, at the City of Rochester, N. Y., Commencing on the 5th Day of January, 1915.

Present:

Hon. Frederick W. Kruse, Presiding Justice.
" James A. Robson,
" Nathaniel Foote,
" John S. Lambert,
" Edgar S. N. Merrell,
Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of WALTER S. KENNEDY, Respondent,
against
FREDERICK BECKER, as Sheriff of Erie County, and THE PEOPLE OF THE STATE OF NEW YORK, Appellants.

The above named Frederick Becker, as Sheriff of Erie County, and the People of the State of New York, defendants in this proceeding, having appealed to the Appellate Division of the Fourth Department from an order of the Supreme Court entered in the office of
20 the Clerk of the County of Erie on the 2nd day of June, 1914, and the said appeal having been argued by Mr. Valentine Taylor, of counsel for appellant, The People of the State of New York, and by Herbert B. Lee, of counsel for appellant, Frederick Becker, as Sheriff of Erie County and by Mr. George P. Decker, of counsel for the respondents, and due deliberation having been had thereon, it is hereby

Ordered, that the order so appealed from be and the same hereby is reversed, the writ of habeas corpus dismissed and the person- upon whose behalf the writ was issued, namely, Fayette Kennedy, Warren Kennedy and Willis White, Jr., are remanded to the custody of the Sheriff of Erie County;

Per curiam opinion all concur, except Merrell, J., who dissents.

NEWELL C. FULTON, *Clerk*.

Enter January 6, 1915.
FREDERICK W. KRUSE.

Certificate of Clerk as to this being true copy of original on file in the office of the Clerk of the Appellate Division at Rochester, N. Y.

[SEAL.]

21 *Opinion of Appellate Division.*

Supreme Court, Appellate Division, Fourth Department.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of WALTER S. KENNEDY, Respondent,
vs.
FREDERICK W. BECKER, as Sheriff of Erie County, THE PEOPLE OF THE STATE OF NEW YORK, Appellants.

Argued at November Term, 1914. Decided at December Term, 1914.

Present:

Hon. Frederick W. Kruse, Presiding Justice.
Robson,
Foote,
Lambert,
Merrell,
Associate Justices.

Appeal by the defendant, sheriff of Erie County, from an order entered in the County Clerk's office of Erie County on the 1st day of July, 1914, discharging Fayette Kennedy, Warren Kennedy and Willis White, Jr., from the custody of said sheriff and from
22 further imprisonments on the ground that certain ancient grants, submissions, agreements, deeds and treaties and particularly the treaty made between the Seneca Nation of Indians and Ogden Land Company, composed of Robert Morris and others, under date of the year 1797, permitting these said persons who are Indians to hunt and fish in the waters of this State, included within said treaties, particularly Eighteen Mile Creek, New York, at will, and at all seasons of the year, regardless of the provisions of the game laws of the State of New York.

Valentine Taylor, Deputy Attorney-General, for appellants.
Wesley C. Dudley, District Attorney, for appellant, Frederick W. Becker.
George P. Decker, for respondent.

Per Curiam:

Robert Morris acquired from the Commonwealth of Massachusetts the right of pre-emption in certain lands in this State, of which the lands where the fishing was done are a part. He also acquired the Indian title under sanction of proper Federal authority, by an instrument in writing dated September 15, 1797, (Report of Special Committee appointed by Assembly of 1888 to investigate the Indian Problem, page 131; Assembly Document 51, 1889), by which the Seneca Nation of Indians, granted to him, his heirs and
23 assigns forever, said land and all of their right, title and interest therein, reserving to them the privilege of fishing and hunting thereon.

We are of the opinion that the Indians, having parted with their right of occupation and all of their interest in the lands, the privilege of hunting and fishing thereon is subject to control and regulation by the State. Even assuming that the Indians have the unrestricted right to hunt and fish upon their own Reservation without interference by the State, these lands are not within the bounds of their Reservation and are in no sense Indian lands. But the question as to whether the Indians have the unrestricted right to hunt and fish upon their own Reservation is not involved in this controversy, and that question we do not decide.

The order should therefore be reserved, the writ of habeas corpus dismissed and the three Indians upon whose behalf the writ was granted remanded to the custody of the sheriff of Erie County.

24 *Notice of Appeal to Court of Appeals.*

Supreme Court, Erie County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of WALTER S. KENNEDY, Plaintiff,

vs.

FREDERICK BECKER, as Sheriff of Erie County, etc., Defendant.

Take notice that the relator above named, aggrieved at the final order filed and entered in the above entitled proceeding against the plaintiff in the Clerk's office of the County of Erie on the 9th day of January, 1915, reversing the order of the Special Term herein which discharged from the custody of defendant the prisoners, Fayette Kennedy, Warren Kennedy and Willis White, Jr., and which said final order was entered on the decision of the Appellate Division, Fourth Department, filed January 6th, 1915, hereby appeals from said final order and from the whole thereof to the Court of Appeals.

Yours, etc.,

GEORGE P. DECKER,
Attorney for Relator.

Office and P. O. Address, 721 Powers Building, Rochester, N. Y.

25 To Wesley C. Dudley, Esq., District Attorney, Erie County, Attorney for Defendant, and the Clerk of Erie County.

Waiver of Certification.

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order appealed from, opinion below, and all the papers before the court upon which said order was founded and now on file in the office of the Clerk of Erie County, and certification thereof pursuant to sections 1353 and 3301 of the Code of Civil Procedure or otherwise is hereby waived.

Dated, March 11th, 1915.

WESLEY C. DUDLEY,
District Attorney and Attorney for Sheriff of Erie County, Respondent.
GEORGE P. DECKER,
Attorney for Relator-Appellant.

26 Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the Court of Appeals, held at the Capitol, in the City of Albany, on the 11th day of May, in the year of our Lord one thousand nine hundred and fifteen, before the Judges of said Court.

Witness, The Hon. Willard Bartlett, Chief Judge, presiding.

R. M. BARBER, *Clerk.*

Remittitur, May 12th, 1915.

27 THE PEOPLE, &c., ex Rel. WALTER S. KENNEDY, Appellant,
ag'st
FREDERICK W. BECKER, as Sheriff, &c., Respondent.

Be it remembered, That on the 13th day of March, in the year of our Lord one thousand nine hundred and fifteen Walter S. Kennedy the appellant in this proceeding came here into the Court of Appeals, by George P. Decker his attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Fourth Judicial Department. And Frederick W. Becker, as Sheriff &c. the respondent in said proceeding afterwards appeared in said Court of Appeals by Wesley C. Dudley, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. George P. Decker of counsel for the appellant, and by Mr. B. F. Sturgess of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered that the record aforesaid, and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

28 Therefore, It is considered that the said order be affirmed as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

R. M. BARBER,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, May 12th, 1915.

I hereby certify that the preceding record contains a correct transcript of the proceedings in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL.] R. M. BARBER, *Clerk.*

29 THE PEOPLE OF THE STATE OF NEW YORK ex Rel. WALTER S. KENNEDY, Appellant,

v.

FREDERICK W. BECKER, as Sheriff of Erie County, Respondent.

30 HISCOCK, *J.:*

By the treaty of "Big Tree" in 1797, the Seneca Nation of Indians ceded to Robert Morris their title to certain lands bounded on the south by Eighteen Mile creek, near Buffalo. Subsequently they ceded to other grantees their title to lands bounded on the north by said creek and lying opposite to those first mentioned. The first treaty contained a provision "excepting and reserving to them, the said party of the first part (the Seneca Nation) and their heirs the privilege of fishing and hunting on the said tract of land hereby intended to be conveyed."

Certain members of the Seneca tribe were arrested for taking fish at a certain point in Eighteen Mile creek, assumed to be covered by the reservation of fishing rights above set forth, in a manner and at a time prohibited by section 176 of the Conservation Law. (L. 1911, ch. 647, as amended.) On being arraigned before a justice of the peace they pleaded not guilty, and pending an adjournment granted at their request were committed to the custody of the defendant sheriff, from which the attempt was made to release them by this writ sued out in their behalf by the relator. It is to be noted that neither the alleged offense nor the arrest took place on any Indian reservation. Both occurred on lands in which the Seneca Nation and the individual offenders had no claim or right outside of those possessed by any individual and those especially secured by the reservation which has been quoted.

Under these circumstances it appears that only two comparatively simple questions are involved in the disposition of this appeal. The first one is whether said reservation of fishing rights secured to the Seneca Nation and its members a right to fish on the territory covered thereby which was superior to any police power and regulation which the state could exercise against all other persons. The second
31 is whether members of said nation if offending the police laws of the state in the respect indicated could be arrested while off the reservation and subjected to punishment by courts of the state. It seems to me that the first of these questions must be answered in the negative and the second one in the affirmative.

As has been said, this case does not deal with the rights of Indians on a reservation set apart for their use. It deals with the interpretation of a provision reserving to them the right in common with other people to take fish on territory which had been ceded away,

and which does not purport to secure to them an exclusive and special privilege, but simply one which might be enjoyed by them in common with other people. The right of the state to enact police legislation for the preservation of game and fish is so well recognized and has been so widely exercised that there is no need to spend any time in demonstrating or justifying its existence. Beyond any question it can exercise this power as against other people who enjoy in common with the Seneca Indians the right to fish in Eighteen Mile creek. It seems to me that it would be an unusual and unreasonable interpretation of this reservation to hold that it relieved the Indians from all of these regulations which are applicable to such other members of the community. The interpretation that their rights are subject to the same regulation as would be applied to others seems much more reasonable and it does not by any means result in emasculating the reservation which was placed in their treaty. Except for such reservation they might be and very likely would be excluded from going upon the stream at all for fishing purposes. The reservation secures them against any such result as this and gives them a right or easement to go there as against their grantee and any other persons. This fundamental right will not be destroyed. It will simply be subjected to such regulation as the state deems to be necessary for the advantage of all of its inhabitants in preserving game and fish.

32 This construction is in accordance with what was said in United States v. Winans (198 U. S. 371, 384). There by treaty the right had been reserved to certain Indians of "taking fish at all usual and accustomed places in common with the citizens of the Territory of Washington." The state of Washington granted the right to use fishing wheels which practically excluded the Indians from fishing at all at certain points, and the question was whether the state might do this. It was held that it might not; that such a course would practically exclude the Indians from their right of taking fish. But it was said that the rights thus secured to the Indians of "taking fish at all usual and accustomed places" did not "restrain the state unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."

So far as concerns the answer to the second question above stated it seems clear that an Indian violating police regulations of the state certainly may be arrested and subjected to the jurisdiction of the state courts where both the violation and the arrest occur outside of any reservation. (Ward v. Race Horse, 163 U. S. 504.)

The order appealed from should be affirmed, with costs.

Werner, Chase, Collin, Hogan, Miller and Cardozo, JJ., concur.

Order affirmed.

33 At a Special Term of the Supreme Court, Held in and for the County of Erie, at the City & County Hall, in the City of Buffalo, N. Y., on the 13th Day of September, 1915.

Present: Hon. Herbert P. Bissell.

Supreme Court, Erie County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of WALTER S. KENNEDY
against
FREDERICK W. BECKER, as Sheriff of Erie County.

The above named plaintiff having appealed to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court made on the 6th day of January, 1915, reversing an order of the Special Term of Erie County Supreme Court made and entered on the 2nd day of June, 1914, sustaining the writ of habeas corpus sued out by the plaintiff herein, and the said appeal having been duly argued at the Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said order so appealed from as aforesaid be affirmed, and having further ordered and adjudged that the proceedings therein be remitted to the Supreme Court there to be proceeded upon according to law;

Now, on reading and filing the remittitur of the Court of Appeals herein, and upon motion of Herbert B. Lee, Esq., of counsel for the defendant, it is

34 Ordered that the said order of the Court of Appeals be and the same hereby is made the order and judgment of this court.

HERBERT P. BISSELL,
Justice Supreme Court.

Enter.

Granted Sept. 13, 1915.
JOHN P. ABBOTT,
Sp. Deputy Clerk.

Filed Erie County Clerk's office Sept. 14, 1915.

35 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court on a remittitur from the Court of Appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit

between The People of the State of New York, on the relation of Walter S. Kennedy, as next friend of Fayette Kennedy, Warren Kennedy and Willis White, Jr., plaintiff and Frederick W. Becker as Sheriff of Erie County, New York, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity;

36 or wherein any title, right, privilege, or immunity was claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such Constitution, treaty, statute, commission, or authority; a manifest error hath happened to the great damage of the said plaintiff, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 5th day of October, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

37 [Endorsed:] Supreme Court of the United States, October term, 191–. The People of the State of New York on the relation of Walter S. Kennedy, etc., vs. Frederick W. Becker, as Sheriff, etc. Writ of Error. Filed Erie County Clerk's Office Oct. 8, 1915.

38 UNITED STATES OF AMERICA, *ss:*

To Frederick W. Becker, as Sheriff of Erie County, New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty

days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of New York wherein The People of the State of New York on the relation of Walter S. Kennedy, as next friend of Fayette Kennedy, Warren Kennedy, and Willis White, Jr., is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles E. Hughes, Associate Justice of the Supreme Court of the United States, this 5th day of October, in the year of our Lord one thousand nine hundred and fifteen.

CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

39 [Endorsed:] Filed Erie County Clerk's Office Oct. 8, 1915.

40 Know all Men by these Presents, That we, Walter S. Kennedy as principal and Charles Wies and Harmon L. Gaing, as sureties, are held and firmly bound unto Frederick W. Becker, as Sheriff of Erie County, New York, in the full and just sum of two hundred and fifty dollars, to be paid to the said Frederick W. Becker as Sheriff of Erie County, New York, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 25th day of September, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a term of the Supreme Court of the State of New York in and for the County of Erie in a suit depending in said Court, between The People of the State of New York on the relation of Walter S. Kennedy as next friend of Fayette Kennedy, Warren Kennedy and Willis White, Jr., plaintiff and Frederick W. Becker as Sheriff of Erie County, New York, defendant, a judgment was rendered against the said plaintiff and the said plaintiff having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit and a citation directed to the said Frederick W. Becker as Sheriff of Erie County, New York, citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said plaintiff shall prosecute said writ to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WALTER S. KENNEDY, [SEAL.]
By GEO. P. DECKER, *His Att'y.*
CHARLES WIES. [SEAL.]
HARMON L. GAING. [SEAL.]

Sealed and delivered in presence of—
GEORGE W. ADAMS.
W. C. HOAG.

Approved by—
CHARLES E. HUGHES,
Associate Justice of the Supreme Court of the United States.

41 STATE OF NEW YORK,
County of Cattaraugus, ss:

Charles Wies of Salamanca, N. Y. and Harmon L. Gaing of Salamanca, N. Y. being severally duly sworn say and each foe himself says: the said Charles Wies that he is a resident of and freeholder within this state and is worth the sum of five hundred dollars over and above all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under execution. And the said Harmon L. Gaing says that he is a resident and freeholder within this state and is worth the sum of five hundred dollars over and above all the debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under execution.

CHARLES WIES,
HARMON L. GAING.

Subscribed and sworn to before me this 25″ day of Sept., 1915.
[L. S.] GEORGE A. ADAMS,
Notary Public.

Commission expires M'ch 30/1917.

Approved:
——— ———.

42 STATE OF NEW YORK,
County of Erie, ss:

To the Supreme Court of the United States:

Pursuant to the writ of error dated October fifth 1915 and served upon me this day I do hereby return the record and proceedings in the suit between The People of the State of New York on the relation of Walter S. Kennedy as next friend of Fayette Kennedy, Warren Kennedy and Willis White Jr. plaintiff and Frederick W. Becker as Sheriff of Erie County New York defendant with all things concerning the same together with said writ, the citation dated October fifth 1915 from said United States Supreme Court to said Frederick W. Becker as said Sheriff and a copy of the bond of the plaintiff in error the original of which is on file in my office, judgment in said suit having been given by the Supreme Court of our State.

Given under my hand and the seal of my office at the Court

House of said County of Erie at the City of Buffalo in said State this 8th day of October in the year 1915.

[SEAL.]

L. A. NASH,
Clerk of the County of Erie and of the Supreme Court of said State of New York for said County.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 10/8/15. L. A. N.]

Endorsed on cover: File No. 24,949. New York Supreme Court. Term No. 666. The People of the State of New York on the relation of Walter S. Kennedy, as next friend of Fayette Kennedy, Warren Kennedy and Willis White, Jr., plaintiffs in error, vs. Frederick W. Becker, as Sheriff of Erie County, New York. Filed October 11th, 1915. File No. 24,949.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE PEOPLE OF THE STATE OF NEW YORK on the relation of Walter S. Kennedy, as next friend of Fayette Kennedy, Warren Kennedy, and Willis White, jr., plaintiffs in error, *v.* FREDERICK W. BECKER, AS SHERIFF OF Erie County, New York.	No. 666.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

MOTION TO ADVANCE.

The plaintiffs in error, appearing by George P. Decker, Esq., the attorney for the relator above named, as also by the Solicitor General, acting on behalf of said relator and of the United States, move the court to advance this cause for hearing on a day convenient to the court during the present term.

This proceeding originated with a petition filed by the relator in the Supreme Court of New York at a special term in Erie County for a writ of habeas corpus to inquire into the cause of the detention by

the sheriff of that county of three tribal Indians of the Seneca Nation. These Indians were under arrest for alleged violation of the fish and game laws of the State by taking fish with spears, for use as food, on lands ceded by the Seneca Nation to Robert Morris in 1797. The cession referred to was made at a public treaty in the presence of a commissioner representing the President, and the treaty was ratified by the Senate on March 11, 1798. The treaty contained the following clause:

> Excepting and reserving to them, the said parties of the first part and their heirs, the privilege of fishing and hunting on the tract of land hereby intended to be conveyed.

It is claimed in behalf of the prisoners that this provision of the treaty secured to the Seneca Indians a perpetual right of fishing and hunting on the ceded land, in accordance with the ancient customs and practices of the tribe, free from any limitations or restrictions by the fish and game laws of the State. This claim was denied by the decision below, and the prisoners remanded to the custody of the sheriff.

Large areas in New York are affected by similar treaty reservations in favor of other Indians of the Six Nations. These Indians, many of whom are unable to speak English and have little knowledge of the game laws of the State of New York, have always been accustomed to hunt and fish upon these lands, and believe and insist that the privilege was secured to them by the treaties. Since this case arose many have been arrested, convicted, and punished in the

State courts for violation of the game laws, and new prosecutions of the same kind are being commenced from time to time by officials of the State. The residence reservations of the Indians are invaded for the purpose of taking them in custody. These conditions are likely to continue as long as the question remains in doubt; that is, as long as it remains a question undecided by this court.

Opposing counsel concur in the motion to advance.

JOHN W. DAVIS,
Solicitor General.

JANUARY, 1916.

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